No. 09-1146

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In The
Supreme Court of the United States

YUMA ANESTHESIA MEDICAL SERVICES LLC,

Petitioner,

v.

LESTER FLEMING, M.D.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is Section 504(d) of the Rehabilitation Act of 1973, 29 U.S.C. § 794(d) (2006), applicable to an independent contractor's disability discrimination claim under Section 504(a), and, if it is, does it exclude an independent contractor from Section 504's otherwise comprehensive protection against disability discrimination in the workplace?

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STATEMENT OF THE CASE

This case presents the narrow question whether Section 504 of the Rehabilitation Act of 1973 protects independent contractors from disability discrimination in the workplace. In a unanimous decision by Judge Bybee, the Ninth Circuit concluded that it does. The court's decision is faithful to the text and legislative history of Section 504, including its amendment in 1992. It also upholds the statute's central purpose of ensuring that federal monies not be used to finance discrimination against qualified people with disabilities.

The only appellate decision to the contrary is cursory and devoid of analysis, and later rulings by the same court call the decision into question. Furthermore, the decision below will affect few people other than the present litigants because suits by independent contractors under Section 504 are rare. Finally, the decision below is correct, for the reasons stated by the court of appeals and for other reasons. Conversely, petitioners' reading of the statute would lead to incongruous results that would undermine the statute's primary purpose. This Court's review is thus not needed.

A. Factual Background

Dr. Lester Fleming is a licensed anesthesiologist. He has sickle-cell anemia, an inherited, chronic

disease that affects roughly 70,000 to 100,000 Americans, mainly African Americans.[1] Despite his disease, Dr. Fleming graduated from medical school in the standard four years, and then completed a four-year residency in anesthesiology. 1st Am. Compl. ¶ 7, App. 3. During his entire medical education and residency, Dr. Fleming neither requested nor received a single accommodation or any other special treatment on account of his disease. *Id.* ¶ 9, App. 4. Thus, contrary to petitioner's intimation, Pet. 12 n.2, sickle-cell anemia has not "severely limit[ed]" Dr. Fleming's daily activities.

Toward the end of his residency in 2005, Dr. Fleming applied for a position as an anesthesiologist with petitioner, Yuma Anesthesia Medical Services ("YAMS"). 1st Am. Compl. ¶ 10, App. 4. YAMS' doctors provide anesthesiology services at the Yuma Regional Medical Center ("Medical Center"). On his job application, Dr. Fleming truthfully answered "Yes" when asked whether he was "able to perform all the procedures for which [he had] requested privileges, with or without reasonable accommodation." Application for Medical Staff Appointment at: Yuma Regional Medical Center 7 (July 6, 2005, received July 15, 2005)

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[1] The main symptom of the disease is occasional pain throughout the body. Most people with sickle-cell anemia manage their pain and lead productive lives. *See generally* Nat'l Heart, Lung, & Blood Inst., Dep't of Health & Human Servs., *Sickle-Cell Anemia: Key Points*, http://www.nhlbi.nih.gov/health/dci/Diseases/Sca/SCA_Summary.html.

(YRMC000091).[2] The form required applicants requesting accommodation to attach a page with additional information. Dr. Fleming submitted his application without requesting any such accommodation.

YAMS offered Dr. Fleming the anesthesiologist position. 1st Am. Compl. ¶ 11, App. 4. The parties executed a medical services agreement in May 2005, in which they agreed that Dr. Fleming would begin work on October 3 of that year. *Id.* In reliance on this agreement, Dr. Fleming applied for and received his license to practice anesthesiology in Arizona and prepared to move to Yuma.

During the Medical Center's process of verifying Dr. Fleming's credentials, YAMS learned that he had sickle-cell anemia. 1st Am. Compl. ¶¶ 12, 15, App. 5-6. Although Dr. Fleming explained that he had never required any accommodation during his medical education, a YAMS partner told Dr. Fleming to cancel his move to Arizona, and YAMS' acting chairman advised him to seek alternative employment. *Id.* ¶¶ 12, 14, 16, App. 5-6.

Four weeks after Dr. Fleming's agreed-upon start date, YAMS still would not let Dr. Fleming begin

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[2] The application did not ask Dr. Fleming "to disclose if he had any medical conditions that would affect his ability to practice medicine . . . ." Pet. 13. Petitioner's paraphrasing of the application's question creates the false impression that Dr. Fleming was not candid in his job application.

work unless he signed an addendum to the original agreement. The proposed addendum stipulated that YAMS would not provide any "reasonable accommodations" if Dr. Fleming was ever unable to adhere to his operating-room or on-call schedules. *Id.* ¶ 20, App. 7. Dr. Fleming declined to sign this addendum, and YAMS refused to honor the original agreement. *Id.* ¶ 21, App. 8. While YAMS represents that Dr. Fleming "unilaterally terminated" their agreement, Pet. 13, Dr. Fleming alleges that YAMS unlawfully discharged him or failed to honor its commitment to hire him, on account of its perception that he was disabled. The lower courts have not yet resolved this disagreement.

B. Statutory Framework

1. Congress originally enacted the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, to "establish[ ] a comprehensive federal program aimed at improving the lot of the handicapped." *Consol. Rail Corp.* v. *Darrone*, 465 U.S. 624, 626 (1984). As Congress later reaffirmed, the Act's purpose was to "empower individuals with disabilities to maximize employment" and their "inclusion and integration into society." 29 U.S.C. § 701(b)(1) (2006). To that end, Congress created federal programs, state-operated vocational-rehabilitation services, and, in the core provision of Section 504(a), "the first federal civil

rights law generally prohibiting discrimination against individuals with disabilities."[3]

Modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006), Section 504(a) is aimed at ensuring that federal monies not be used to finance discrimination. The statutory protection of otherwise qualified individuals is broad and comprehensive. It protects *all* qualified individuals from disability-based discrimination by entities that receive federal funding. Section 504(a) provides:

> *No* otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any* program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a) (2006) (emphases added).

One of the statutory definitions of an "individual with a disability" is someone whose impairment "constitutes or results in a substantial impediment to employment." 29 U.S.C. § 705(20)(A) (2006).[4] As this

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[3] Cong. Research Serv., Report RL34041, *Section 504 of the Rehabilitation Act of 1973: Prohibiting Discrimination Against Individuals with Disabilities in Programs or Activities Receiving Federal Assistance* (2009).

[4] The statute originally referred to a "handicapped individual," defined as anyone whose "handicap" constituted a substantial "handicap to employment." Pub. L. No. 93-112, § 7(6), 87

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Court has noted, however, "enhancing employment of the handicapped was so much the focus of the 1973 legislation" that Congress "the next year felt it necessary to amend the statute" to clarify that "§ 504 was intended to prohibit other types of discrimination as well." *Darrone*, 465 U.S. at 632. As the Senate Committee Report explained, Section 504 "was not to be narrowly limited to employment." S. Rep. No. 93-1297, at 6388 (1974).

The 1974 amendment extended the definition of "individual with a disability" to anyone who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment." Pub. L. 93-516, § 111(a), 88 Stat. 1617, 1619 (1974) (codified at 29 U.S.C. § 705(20)(B) (2006)).[5] Thus, Congress ensured that Section 504 would provide the same protection from discrimination to employees and other "qualified individuals" in any program or activity – workplace or otherwise – that receives federal funding.[6]

Stat. 355, 361 (1973). This language was replaced with the current definition in 1992. Pub. L. No. 102-569, § 102(f), 106 Stat. 4344, 4348 (1992).

[5] Congress further amended the Rehabilitation Act in 2008. Section 705(20)(B) now incorporates the virtually identical definition in the ADA. 29 U.S.C. § 705(20)(B) (incorporating 42 U.S.C. § 12102 (2006)).

[6] Subject to certain qualifications, the statute excludes from its definition of "individual with a disability" anyone currently engaged in the illegal use of drugs or the abuse of alcohol,

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2. Section 504's limitation to entities receiving federal funds "was one of the primary constraints of the Act that advocates felt necessitated the passage of a broader statute." Katie Eyer, *Rehabilitation Act Redux*, 23 Yale L. & Pol'y Rev. 271, 282 (2005). In 1990, therefore, Congress enacted the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 ("ADA"). While it based much of the substance of the ADA on Section 504 and regulations issued under it,[7] Congress applied the anti-discrimination mandate of the ADA to private employers regardless of federal funding.

Thus, Title I of the ADA forbids employment discrimination against "employee[s]" by "employer[s]" who are "engaged in an industry affecting commerce" and who have "15 or more employees." 42 U.S.C. §§ 12111(2), (5), 12112(a). Title I deals exclusively with employment – that is, interactions between employers and employees. These aspects of Title I were deliberate departures from Section 504, which is not limited to employment and which covers *all* qualified individuals with disabilities and *all* recipients of federal financial assistance. As petitioner notes, the two statutes' "respective scopes, although overlapping, are not coextensive." Pet. 10 n.1. While some entities are

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individuals with contagious or infectious diseases, and individuals who meet certain other specific criteria. 29 U.S.C. §§ 705(20)(C), (D), & (E).

[7] *See* 42 U.S.C. § 12201 (2006); *Bragdon* v. *Abbott*, 524 U.S. 624, 646-47 (1998).

subject to just one of the two statutes, many others are subject to both Section 504 and Title I.[8]

In enacting the ADA, Congress expressly directed that it not be interpreted in a manner that would undermine any of Section 504's protections, stating:

> [N]othing in [the ADA] shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act or . . . to *invalidate or limit* the remedies, rights, and procedures of any Federal law . . . that provides greater or equal protection for the rights of individuals with disabilities . . . .

42 U.S.C. § 12201(a), (b) (emphasis added). In short, Congress intended the ADA to supplement Section 504, not to supplant it.[9]

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[8] YAMS maintains that it is not an "employer" under Title I of the ADA because it is composed of members and independent contractors and has no employees. Memorandum in Support of Yuma Anesthesia Medical Services' Motion for Summary Judgment, *Fleming* v. *Yuma Reg'l Med. Ctr.*, No. Civ. 05-3906 (D. Ariz. Apr. 27, 2007), at 3. As a recipient of Medicare and Medicaid funds, YAMS is subject to Section 504. *See United States* v. *Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1042, 1046 (5th Cir. 1984).

[9] Petitioner says "the courts of appeals have generally treat[ed] [Title I and Section 504] as 'twin statutes' with regard to employment discrimination suits." Pet. 11 (citing *Garcia* v. *S.U.N.Y. Health Sci. Ctr.*, 280 F.3d 98, 113 n.3 (2d Cir. 2001)). The Second Circuit described the two statutes as "twin[s]," however, only insofar as they "impose identical *obligations* upon employers." *Garcia*, 280 F.3d at 113 n.3 (emphasis added) (internal quotation marks omitted). The statutes are not "twin[s]"

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3. The enactment of the ADA spawned a huge amount of litigation, which dwarfed previous litigation under Section 504.[10] The law of workplace disability discrimination developed more rapidly and extensively under Title I of the ADA than it had under Section 504 – and not always consistently.[11]

Congress responded in 1992 by enacting Section 504(d), which applies to the subset of Section 504(a) cases that involve "employment discrimination." Section 504(d) provides: "The *standards* used to determine whether . . . section [504(a)] has been *violated* in a complaint alleging employment discrimination . . . shall be the *standards* applied under title I of the Americans with Disabilities Act . . . ." 29 U.S.C. § 794(d) (emphases added). The purpose of Section 504(d) was to "ensure uniformity and consistency of interpretations" as to what conduct would violate both Section 504 and Title I. S. Rep. No. 102-357, at 71 (1992). Senator Harkin, the amendment's principal sponsor, explained: "Now those who are covered by title V of the Rehabilitation Act will know that these are the

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with regard to their scope of coverage, and only Title I, not Section 504, is addressed exclusively to "employers."

[10] Steven Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 Vand. L. Rev. 391, 433 (1995).

[11] Sam Silverman, *The ADA Interactive Process: The Employer and Employee's Duty to Work Together to Identify a Reasonable Accommodation Is More Than a Game of Five Card Stud*, 77 Neb. L. Rev. 281, 281 (1998).

definitions of *reasonable accommodation* and *discrimination* that apply." 138 Cong. Rec. 31,523 (1992) (emphases added).

Subsection (d) thus specifies substantive standards for resolving the subset of Section 504(a) claims that allege "employment discrimination." It has no impact on Section 504(a) claims that allege other kinds of discrimination, including workplace discrimination not involving "employers" and "employees." These claims are outside the purview of Section 504(d) and simply proceed under the general provision of Section 504(a).[12]

C. Judicial Proceedings

1. Dr. Fleming sued YAMS in the U.S. District Court for the District of Arizona.[13] Among other claims, the complaint alleged that YAMS violated Section 504 when it "learned that Dr. Fleming had sickle cell disease" and "refused to hire" him. 1st Am.

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[12] Section 504 does not contemplate "two categories of enforcement actions – those 'alleging employment discrimination' (29 U.S.C. § 794(d)) and all others." Pet. 5. All discrimination complaints are brought under Section 504(a). Section 504(d) does not provide a separate right or cause of action; it merely directs courts to apply the "standards" of Title I to a particular subset of Section 504(a) complaints.

[13] Dr. Fleming also named the Medical Center as a defendant, but they have settled their dispute. *See* Brief for Appellant, *Fleming* v. *Yuma Reg'l Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009) (No. 07-16427), at 7 n.1.

Compl. ¶¶ 33, 34, App. 10. The complaint also alleged that "YAMS perceived Dr. Fleming as being substantially limited in one or more major life activities including, but not limited to, working, as defined by Section 504." *Id.* ¶ 22, App. 8. This, of course, tracks the definition of an "individual with a disability" under Section 705(20)(B). Dr. Fleming did not allege that he has a disability that is a substantial "impediment to employment" (under Section 705(20)(A)).

YAMS moved to dismiss the complaint. With respect to Dr. Fleming's Section 504 claim, YAMS argued that Title I of the ADA protects only employees, not independent contractors; that Section 504(d) makes the "standards" of Title I applicable to Section 504 complaints alleging "employment discrimination"; and therefore that Section 504(d) excludes independent contractors from the coverage of Section 504. The district court denied this motion so that the parties could conduct discovery as to whether Dr. Fleming was to have been YAMS' employee or an independent contractor.

After discovery, Dr. Fleming acknowledged that he was an independent contractor, and the district court granted YAMS' motion for summary judgment. It stated, without elaboration, that the protections of Section 504 "apply to an employee-employer relationship and do not extend to cover independent contractors." Pet. App. 19a.

2. Dr. Fleming appealed to the U.S. Court of Appeals for the Ninth Circuit, which unanimously

reversed. *Fleming* v. *Yuma Regional Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009). In an opinion by Judge Bybee, the court concluded that Section 504 protects a broader class of disabled individuals than the ADA does, and covers "'all of the operations' of covered entities, not only those related to employment." *Id.* at 941-42, Pet. App. 6a-7a. The court held that Section 504 "is not limited to employers and employees as defined in Title I of the ADA, but rather applies to independent contractors and the entities that hire them." *Id.* at 946, Pet. App. 16a. The court also ruled that the ADA "standards" to which Section 504(d) refers are those for determining *what* conduct is prohibited, not *who* is covered. *Id.* at 944-45, Pet. App. 11a.

The Ninth Circuit declined to follow an Eighth Circuit decision holding that Section 504 covers only employees. That decision contained only a "brief" and "cursory" treatment of the coverage of Section 504 and no discussion of Section 504(d). *Id.* at 945, Pet. App. 14a-15a (discussing *Wojewski* v. *Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338 (8th Cir. 2006)). Similarly, the court regarded the Sixth Circuit's decision in *Hiler* v. *Brown*, 177 F.3d 542 (6th Cir. 1999) – which did not concern an independent contractor, or Section 504, or Title I of the ADA – as "of dubious relevance to this case." *Id.* at 946; Pet. App. 15a-16a.

Accordingly, the court held that Dr. Fleming's "disability discrimination claim under § 504 . . . and

his action against [YAMS] may proceed." *Id.* at 946, Pet. App. 16a.

ARGUMENT

Nothing about the decision below warrants this Court's review. The circuit courts are not "deeply divided" on the question presented. Pet. 1, 17. There is at best a possible conflict between the court below and only one other court of appeals decision. This shallow and recent disagreement should not concern this Court, since the Eighth Circuit reached its conflicting decision "absent authority to the contrary," and later decisions cast doubt on the continued vitality of that decision. Other courts – including the Eighth Circuit – now have the benefit of the Ninth Circuit's analysis, and likely will resolve the conflict themselves.

Petitioner also overstates the scope and importance of the issue. Resolving the question presented will not "define the obligations that recipients of federal funds owe disabled individuals." Pet. 1. It will simply decide whether Section 504(d) silently revoked the rights of an independent contractor like Dr. Fleming under Section 504(a). The substantive content of the statute's protection is not at issue here. Moreover, suits under Section 504 are rare, and such suits by independent contractors even rarer.

Finally, the interlocutory decision below is manifestly correct, based on the statute's text, legislative

history, policy, and logic. In short, this Court's review is not warranted.

I. The Circuit Split Is Shallow and Immature, and May Well Resolve Itself

A. Any Conflict Is Limited to Two Circuits

1. In two of the cases cited by petitioner, there was no question that the plaintiff was entitled to bring suit under Section 504. Rather, the defendants in those cases argued that *they* were outside the statute's purview.

a. The Tenth Circuit's decision in *Schrader* v. *Ray*, 296 F.3d 968 (10th Cir. 2002), raised no question about an independent contractor's rights under Section 504. It was undisputed that the plaintiff in *Schrader* was an employee of a federal-funds recipient, but the employer had fewer than fifteen employees and therefore was not covered by Title I of the ADA. Absent Section 504(d), with its reference to Title I, there would have been no doubt that the employer was subject to Section 504(a). The question, therefore, was whether Section 504(d) cut back on the scope of Section 504 and relieved the employer of its nondiscrimination obligation.

The Department of Justice, which is responsible for coordinating enforcement of both Section 504 and

the ADA,[14] submitted an amicus brief in *Schrader*. It emphasized the intentional differences in scope of the two statutes, and explained that Section 504(d)'s reference to Title I's "standards" did not in any way limit Section 504's coverage of *all* entities that receive federal funds. Brief for the United States as Amicus Curiae, *Schrader* v. *Ray*, at 7 (10th Cir. 2002) (No. 00-5224), http://www.justice.gov/crt/briefs/schrader.pdf ("*Schrader* Amicus Br"). The Tenth Circuit agreed, holding that "§ 504(d) addresses only the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered." 296 F.3d at 972.

The Tenth Circuit did not have before it, and did not decide, the question of an independent contractor's rights – or the rights of any particular type of plaintiff – under Section 504. The Justice Department's amicus brief and the Tenth Circuit's reasoning are consistent with the Ninth Circuit's opinion in this case, but the courts' holdings are on distinct questions.

b. Petitioner asserts no real conflict with *Hiler* v. *Brown*, 177 F.3d 542 (6th Cir. 1999), but only that that decision is "in substantial tension" with the decision below. Pet. 16. In fact, there is no tension. *Hiler* had nothing to do with independent contractors, Section 504(a) or (d), or Title I. The Ninth Circuit

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[14] Executive Order No. 12,250, 3 C.F.R. 298 (1981).

correctly stated that *Hiler* "does not speak to the issue" in this case. 587 F.3d at 946, Pet. App. 16a.

In *Hiler*, a government employee sued his supervisors in their individual capacities for retaliation under Section 501 of the Rehabilitation Act and Title VII of the Civil Rights Act, whose "remedies, procedures, and rights" are the vehicle for private actions under Section 501. *Hiler*, 177 F.3d at 545 (quoting 29 U.S.C. § 794a(a)(1)). The Sixth Circuit noted that supervisors are not included in Title VII's definition of "employer." Since "[t]he enforcement provisions of Title VII permit civil actions against an 'employer,' . . . individuals who are not employers under Title VII cannot be held personally liable" under Section 501. *Id.* at 545-46.

Hiler has no bearing on whether an independent contractor can sue a recipient of federal funds covered by Section 504. The *Hiler* court limited suits under Section 501 to employers because Title VII is so limited, not because of Title I of the ADA. Suits under Section 504, however, are governed not by Title VII, but by Title VI. *Compare* 29 U.S.C. § 794a(a)(1) *with id.* § 794a(a)(2). Both Section 504(a) and Title VI cover "any program or activity" that receives federal funds. The definition of "employer" does not come into play. Moreover, *Hiler* says nothing about proper plaintiffs in suits under Section 501, much less under Section 504. As the court below noted, the Sixth Circuit was deciding a different issue, so *Hiler* is "of dubious relevance to this case." 587 F.3d at 946, Pet. App. 15a.

Understandably, the Sixth Circuit did not mention Section 504(d) in *Hiler*. In a later case, however, that court recognized that under Section 504(d), it is the "substantive standards of the ADA" and its "legal analysis of [a plaintiff's] claims" that are brought to bear on employment discrimination claims under the Rehabilitation Act. *Plautz* v. *Potter*, 156 F. App'x 812, 816 (6th Cir. 2005) (unpublished per curiam). There is thus no indication that the Sixth Circuit would rule any differently than the court below on a suit by an independent contractor under Section 504(a).[15]

2. Both the D.C. Circuit's decision in *Redd* v. *Summers*, 232 F.3d 933 (D.C. Cir. 2000), and the Idaho Supreme Court's decision in *Levinger* v. *Mercy Med. Ctr.*, 75 P.3d 1202 (Idaho 2003), are factually distinguishable from this case. Neither involved a suit against the entity that had hired the plaintiff. Neither party mentioned *Redd* in the courts below, and the Ninth Circuit did not address either *Redd* or *Levinger* in its opinion. Nevertheless, both decisions actually support Dr. Fleming's right to sue under Section 504(a).

a. The plaintiff in *Redd* sued the Bureau of Engraving and Printing (the "Bureau") under Sections

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[15] The anti-retaliation provision of Title V of the ADA, 42 U.S.C. § 12203(a), which the Sixth Circuit applied in *Hiler*, presumably is the kind of substantive "standard" that the Ninth Circuit would consider applicable to an employment discrimination suit under Section 504, "for proving when discrimination in the workplace is actionable." 587 F.3d at 939, App. 2a.

501 and 504. She had been fired from her job with a company that provided tour guides to the Bureau. The parties agreed that Section 501 applied "only to disability discrimination in federal government *employment*." 232 F.3d at 937 (emphasis added). The D.C. Circuit held that Redd could not sue the Bureau under Section 501 because she had not been its employee. *Id.* at 936.[16]

The more relevant part of the D.C. Circuit's opinion is its holding that Redd could pursue her claim against the Bureau under Section 504. The fact "that the Bureau was not her employer . . . sheds no light on th[e] question" of Redd's rights under Section 504. *Id.* at 941. Because the "Bureau's tour guide contract may constitute a federal program or activity, in which . . . Redd [was] entitled to show . . . she was unlawfully denied participation," the court held that Redd's Section 504 claim against the Bureau could proceed. *Id.* The D.C. Circuit did not even mention Section 504(d) as a possible bar to Redd's suit.

While petitioner asserts that differences between Sections 501 and 504 are "immaterial," Pet. 22 n.7, those differences were critical in *Redd*. With respect to Section 504, *Redd* is in accord with the Ninth Circuit's decision in this case.

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[16] While the court briefly mentioned that Section 501(g) makes Title I's standards applicable to suits under Section 501, it did not discuss or rely on Section 501(g) in affirming the grant of summary judgment on Redd's Section 501 claim. *Compare* 232 F.3d at 936 *with id.* at 941.

b. *Levinger* likewise does not conflict with the decision below. Dr. Levinger was an independent contractor for a medical group that provided doctors' services to a local hospital. 75 P.3d at 1204. But the Idaho Supreme Court's decision was not about Dr. Levinger's suit against the *medical group*; it concerned his suit against the *hospital*. Since Dr. Levinger was hired by the group, which in turn provided services to the hospital, the doctor was neither an employee nor an independent contractor of the hospital. *Id.* at 1204-05. The court therefore concluded that Dr. Levinger could not "proceed with his *employment discrimination* claims" against the hospital. *Id.* at 1206 (emphasis added).

The court's addition of the phrase "since he is an independent contractor," *id.* at 1204, is neither necessary to the decision nor relevant to whether an independent contractor can sue the entity that hired him. The court would have reached the same conclusion had Dr. Levinger been an employee of the medical group. The court's holding therefore does not conflict with the Ninth Circuit's in this case.[17]

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[17] Neither party's brief in *Levinger*, in the trial court or the Idaho Supreme Court, questioned whether independent contractors may sue under Section 504. The Idaho Supreme Court cited nothing in support of its *sua sponte* dictum other than Justice Scalia's comment in dissent that Title I does not cover independent contractors. 75 P.3d at 1208 (citing *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 692 (2001) (Scalia, J., dissenting)). Justice Scalia's statement, however, said nothing about Section 504.

More importantly, the Idaho Supreme Court approved of the trial court's decision to allow the jury to consider Dr. Levinger's Section 504 claim to the extent that it did not allege "employment discrimination." Understanding that phrase to mean only discrimination by an employer against its employee, the court held that the trial court properly allowed Levinger to pursue his claim that the hospital "violated the Rehabilitation Act . . . by regarding Levinger as being disabled and denying him hospital privileges." *Id.* at 1209.

The ruling in *Levinger*, like the ruling in *Redd*, accords with the Ninth Circuit's holding in this case. Neither the D.C. Circuit nor the Idaho Supreme Court considered Section 504(d) a bar to "Rehabilitation Act . . . claims for other than employment discrimination." *Id.* Both courts allowed the suits by non-employees to proceed under Section 504.

3. The only appellate decision whose result actually conflicts with the result below is the Eighth Circuit's decision in *Wojewski*. That cursory, conclusory decision's continued vitality is doubtful, however, in light of later Eighth Circuit decisions.

Dr. Wojewski, a cardiothoracic surgeon with bipolar disorder, had his hospital privileges revoked after he suffered an acute manic episode while performing open-heart surgery. He then sued the hospital under Section 504 and Title I of the ADA. The district court dismissed the suit on the ground that

the doctor was an independent contractor rather than the hospital's employee.

The Eighth Circuit affirmed. It agreed that Title I of the ADA did not cover Dr. Wojewski because he was an independent contractor. In addressing the doctor's Rehabilitation Act claim, the court merely said: "Given the similarity between Title I and the Rehabilitation Act, absent authority to the contrary, we construe both to apply to an employee-employer relationship." 450 F.3d at 345. The court believed that affording rights to an independent contractor would "extend" the Rehabilitation Act's coverage. *Id.* The Eighth Circuit's decision rested on its incorrect understanding of the scope of Section 504 generally – an understanding that petitioner neither defends nor advocates. The court did not mention or rely on Section 504(d).

As petitioner acknowledges, the Eighth Circuit has not adhered to *Wojewski*'s narrow reading of Section 504. *See* Pet. 20 n.6 (citing *M.P. ex rel. K. & D.P.* v. *Indep. Sch. Dist. No. 721*, 439 F.3d 865, 868 (8th Cir. 2006) (applying Section 504 to a student's claim against his school)). Furthermore, while *Wojewski*'s result may conflict with the result in this case, its opinion does not address the same question of statutory interpretation. In a later decision actually addressing the incorporation of the ADA's standards, the Eighth Circuit expressed an understanding consistent with the Ninth Circuit's in this case. *See*

Lewis v. *Johanns*, 180 F. App'x 599, 601 (8th Cir. 2006) (unpublished per curiam).[18]

The Eighth Circuit would almost certainly reconsider the independent contractor issue if faced with it again, in light of its later decisions and the Ninth Circuit's statutory analysis in this case. Therefore, the courts of appeals will likely resolve any conflict themselves, without this Court's intervention.

B. This Shallow Disagreement Is Immature and Undeveloped

This limited 1-1 conflict in the lower courts falls far short of the "widespread," "deep and intractable" conflict that petitioner describes. Pet. 31, 17. Only two courts have addressed the question presented. Only the decision below rests on settled law concerning the scope of Section 504(a) and a reasoned

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[18] In *Lewis*, the court noted that the lower court had incorrectly referred to the ADA, rather than the Rehabilitation Act, in a Rehabilitation Act suit against the United States Department of Agriculture. The United States is explicitly excluded from the ADA's definition of "employer." 180 F. App'x at 601. The Eighth Circuit excused the error because "the same basic standards and definitions are used" under both statutes. *Id.* The court did *not* hold that the United States could not be sued, which would have been the necessary conclusion from petitioner's interpretation of the statute. Thus, the Eighth Circuit evinced an understanding that Sections 504(d) and 501(g) incorporate Title I's substantive standards but not its scope. *See infra* p. 37 n.35.

analysis of the relationship between that section and Section 504(d).

Petitioner's claim that there is a "long-standing and ever-deepening" conflict in the circuits, Pet. 4, is also an exaggeration. *Wojewski* was decided in 2006 – twenty-three years after Congress enacted Section 504. The Ninth Circuit's decision in this case, three years after *Wojewski* and within the past year, is the first decision to disagree with *Wojewski*. Thus, any conflict has just emerged; it is far from "long-standing and ever-deepening."[19]

Moreover, the opinions cited by petitioner are diffuse and confusing. The few extant opinions rarely even address the same statutory provisions or arguments. There are contradictions in the decisions of a particular court or even within a decision. *See* Pet. 23 n.8 (claiming that there is "apparent confusion" and internal "inconsisten[cy]" in the D.C. Circuit's opinion in *Redd*).

Under the circumstances, it would be best to let these issues percolate in the circuit courts, so that any divergence in views can either come into sharper focus or be resolved by the lower courts.

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[19] In the district court, petitioner maintained that there was no previous disagreement on this issue. Reply in Support of Yuma Anesthesia Medical Services' Motion for Summary Judgment, *Fleming* v. *Yuma Reg'l Med. Ctr.*, No. Civ. 05-3906 (D. Ariz. July 3, 2007), at 4.

II. Petitioner Overstates the Importance of the Issue

A. Petitioner Inflates the Apparent Importance of This Case by Raising Questions Not Before This Court

The narrow question presented is whether an independent contractor may enforce his rights under Section 504(a). This is the issue decided by the courts below; it is the question presented by petitioner; and it is the only question properly before this Court.

To inflate the apparent importance of this case, petitioner alludes to several broader questions about Title I and Section 504. For example, petitioner asks this Court to "define the obligations that recipients of federal funds owe disabled individuals," as well as "the legal standards that govern suits alleging the violation of those obligations." Pet. 1. These queries lead to other, more specific questions, such as whether a claimant under Section 504 must show that his disability was the "sole cause" of the defendant's conduct, or just a "motivating factor." Pet. 4, 17, 27. As petitioner acknowledges, this latter issue is itself the subject of another circuit split, involving other issues not including independent contractors' rights. Pet. 27-28 n.10 (citing conflicting First and Fifth Circuit decisions).

These and other potential issues of statutory interpretation, however, are not encompassed by the question presented and are not properly before this Court. There has been no trial or appellate review

during which any of the respective statutory standards would have been explicated or applied. The parties have not briefed these issues in the courts below, and neither court has ruled on them. Because of the interlocutory posture of this case, there is no way to know which of these issues may arise at trial or how they will be resolved.

This Court doubtless would not address these discrete issues without the benefit of their full development and adjudication in the courts below. They are therefore not relevant to this Court's assessment of whether to grant review.

B. Suits Under Section 504 Are Rare, and Such Suits by Independent Contractors Are Even Rarer

Section 504 applies to fewer entities and protects fewer individuals than Title I of the ADA does. Not surprisingly, there are far fewer suits under Section 504 than under Title I, which has generated an enormous amount of litigation and case law.[20] During its first seventeen years, only 265 lawsuits were filed under Section 504. By contrast, Title I generated an immediate explosion of litigation – 30,000 charges of discrimination were filed during its first two years.[21]

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[20] Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 Berkeley J. Emp. & Lab. L. 19, 21 n.20 (2000).

[21] Epstein, *supra* n.10, at 433; *see also* Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme*

(Continued on following page)

After passage of the ADA, Section 504 became even less important than before, particularly as a vehicle for workplace discrimination suits. The statute simply has not "produce[d] a substantial body of case law." Selmi, *supra* n.21, at 535.

This case's lack of general importance becomes even clearer if one focuses on the number of Section 504 suits brought specifically by independent contractors. Petitioner identifies five decided cases. Pet. 20 n.5. Even if there are others, a handful of cases over several decades does not suggest a pressing need for this Court's review.

Nor is there reason to believe that this case "[a]ffects [l]arge [s]ectors of the [e]conomy." Pet. 29. Independent contractors make up a segment of the workforce that has not changed significantly over time.[22] While petitioner suggests that recent federal financial assistance may lead to greater use of independent contractors, Pet. 29-30, this is mere speculation. If petitioner's predictions come true, and if the frequency of suits by independent contractors

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Court Rewrote the Statute, and Why Congress Did Not Care, 76 Geo. Wash. L. Rev. 522, 535 (2008) (noting only 335 appellate cases even mentioning the Rehabilitation Act from 1973 to 1984, compared with over 900 federal appellate cases mentioning the ADA in 1997 alone).

[22] The percentage of independent contractors in the workforce remained steady within the mid-6% to 7% range, for the fifteen-year period ending in 2005. *See* Bureau of Labor Statistics, Independent Contractors in 2005, *available at* http://www.bls.gov/opub/ted/2005/jul/wk4/art05.htm.

increases dramatically, and if a substantial conflict in the circuits develops, there will be ample opportunity for this Court to intervene.

III. The Ninth Circuit Correctly Held That Section 504 Protects Independent Contractors

The Ninth Circuit's decision is correct. Section 504(a) provides comprehensive protection from discrimination to all qualified individuals with disabilities. As a remedial statute, it is to be construed liberally. Nothing in Section 504(d) requires limiting that protection to employees, and petitioner has not cited a single appellate case so holding.

There is an additional, alternative basis for affirming the court of appeals' decision.[23] It is by no means clear that Section 504(d) even applies to this case, since the complaint does not allege "employment discrimination." Rather, it alleges exclusion from, denial of the benefits of, and discrimination under a covered program or activity. Several of the cases petitioner cites did not even address Section 504(d) in the course of affirming the validity of Section 504 suits by non-employees alleging workplace discrimination.

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[23] Respondent, of course, may argue any ground in support of the judgment below. *Langnes* v. *Green*, 282 U.S. 531, 539 (1931).

A. Section 504(a) Protects All Otherwise Qualified Individuals, Including Independent Contractors, from Discrimination in a Covered Activity or Program

1. Section 504(a) provides that "[n]o otherwise qualified individual with a disability" may be "excluded from the participation in, denied the benefits of, or subjected to discrimination under" any covered program or activity. 29 U.S.C. § 794(a). Section 504(a)'s broad and inclusive language clearly covers Dr. Fleming's allegation that YAMS, a recipient of federal funds, "refused to hire" him based on his disability or perceived disability. 1st Am. Compl. ¶¶ 22, 33, 34, 37, App. 8, 10.

Dr. Fleming qualifies as a "person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such impairment; or (iii) is regarded as having such an impairment." 29 U.S.C. § 705(20)(B) (2006).[24] The statute specifically spells out exceptions to this definition, and being an independent contractor is not one of them. *See* 29 U.S.C. §§ 705(20)(C), (D), & (E).

Absent Section 504(d), there could be no argument that Dr. Fleming falls outside the statute's protection, and petitioner has not made such

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[24] The current definition of an "individual with a disability" in Section 705(20)(B) incorporates the virtually identical definition in the ADA. *See supra* p. 6 n.5.

an argument.[25] Section 504(d), however, does not define the terms used in Section 504(a); nor does it purport to replace, contradict, or modify the statutory definitions.

More broadly, it is not clear that Section 504(d) even applies to this case. Dr. Fleming does not allege that he has a disability that is an "impediment to employment." Rather, he alleges that he is (or is perceived as) "limited in one or more major life activities including, but not limited to, working, as defined by § 504." 1st Am. Compl. ¶ 22, App. 8. While a central concern of Section 504 was "enhancing employment of the handicapped," Congress added this alternative definition of "individual with a disability" to make clear that "it was intended to prohibit other types of discrimination as well." *Darrone*, 465 U.S. at 632.

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[25] The decision to the contrary in *Wojewski* is wrong. There, the Eighth Circuit jumped from the "similarity between Title I and the Rehabilitation Act" to the conclusion that both "apply to an employee-employer relationship." 450 F.3d at 345. The court ignored a key difference between the statutes, namely, that Title I of the ADA explicitly protects only "employees," whereas Section 504 protects any "otherwise qualified individual with a disability" (subject to the enumerated statutory exceptions). Contrary to the Eighth Circuit's reasoning, applying Section 504(a) to an independent contractor like Dr. Wojewski would not have required the court to "extend" Section 504's "coverage." *Id.* As noted *supra* pp. 21-22, later Eighth Circuit decisions have retreated from *Wojewski*'s unduly narrow reading of Section 504.

In the district court, YAMS repeatedly insisted that its agreement with Dr. Fleming established "no employment relationship" and that an "'employment agreement' does not exist."[26] YAMS now characterizes Dr. Fleming's complaint as one "alleging employment discrimination," but only to bring it under Section 504(d) in order to have it dismissed on the ground that Dr. Fleming is not an "employee" as required by Title I of the ADA.

Petitioner cannot have it both ways. If Dr. Fleming is not an "employee" and petitioner is not an "employer," then the complaint should not be treated as one alleging "employment discrimination" for purposes of Section 504(d). Petitioner agrees that it is "illogical to allow *employment* discrimination claims by independent contractors, who are, by definition, *not* employees." Pet. 32. Petitioner leaps from that premise, however, to the conclusion that Section 504(d) requires the dismissal of Dr. Fleming's suit. The more logical conclusion, and the one consistent with the statute's language and purpose, is that Section 504(d) simply does not apply.

The Justice Department agrees with this analysis. It has taken the position that because Section 504(d) "applies only to 'a complaint alleging

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[26] Reply in Support of Yuma Anesthesia Medical Services' Motion to Dismiss, *Fleming* v. *Yuma Reg'l Med. Ctr.*, No. Civ. 05-3906 (D. Ariz. May 1, 2006), at 4; Memorandum in Support of Yuma Anesthesia Medical Services' Motion to Dismiss (Mar. 6, 2006), at 5.

employment discrimination,'" entities too small to be covered by Title I (like petitioner) nevertheless are subject to suits under Section 504 "by individuals who are not employees (such as patients and independent contractors)." *Schrader* Amicus Br. 11.

2. Based on the breadth of Section 504(a), courts have not limited its protection to employees. Some of the very cases cited by petitioner recognize that an individual can sue a recipient of federal funds for workplace discrimination even if he or she was not employed by that employer, or, for that matter, by any employer. The D.C. Circuit allowed the plaintiff in *Redd* to pursue her Section 504 claims against the Bureau, even though she was not its employee. And the Idaho Supreme Court approved of the trial court's submission to the jury of Dr. Levinger's Section 504(a) claims against the medical center, even though, as an independent contractor of a medical-services group, he was not employed by anyone.

Even a volunteer has been allowed to pursue a Section 504(a) claim against the government based on allegations that she was denied a position with the Peace Corps on account of her disability. *See Mendez* v. *Gearan*, 947 F. Supp. 1364, 1370-71 (N.D. Cal. 1996). Peace Corps volunteers clearly are not employees: a federal statute explicitly states that such volunteers "shall not be deemed . . . employees . . . of . . . the United States for any purpose." 22 U.S.C. § 2504(a) (2006).

3. Petitioner's internally inconsistent position on the applicability of Section 504(d) is incorrect, illogical, and unsupported by authority. To make matters worse, petitioner's contention that Section 504(d) would bar Section 504(a) suits by non-employees would undermine the statute's purpose of affording comprehensive protection against disability discrimination in the workplace. *See infra* Section III.B.

Indeed, petitioner's interpretation turns Section 504(d) into a trap – in effect, the Bermuda Triangle of statutes. If an independent contractor is drawn into its range, he disappears from the Section 504 universe completely, rather than simply being guided back to the safe territory of Section 504(a). This is not what Congress intended in a remedial law designed to protect *all* qualified individuals from disability discrimination in the workplace and beyond.

B. Section 504(d) Does Not Take Away Rights Given by Section 504(a)

Even if Dr. Fleming's complaint is viewed as alleging "employment discrimination," thereby triggering the application of Section 504(d), that provision would not affect or limit the coverage of Section 504(a). Petitioner's argument to the contrary misconstrues both statutory provisions. It contradicts the statutory text and legislative history. It calls other statutory provisions and case law into question. And it defeats some of the purposes of both provisions and leads to incongruous results.

1. Subsection (d) provides that "[t]he *standards* used to determine whether [Section 504] has been *violated* in a complaint alleging employment discrimination under this section shall be the *standards* applied under Title I of the Americans with Disabilities Act . . . ." 29 U.S.C. § 794(d) (emphases added). The usual meaning of "standard" is a "measure or rule applicable in legal cases such as the standard of care in tort actions." *Black's Law Dictionary* 1404 (6th ed. 1990).

Section 504(d) thus refers to standards of liability, not scope of coverage. *See* 587 F.3d at 944, Pet. App. 11a; *Schrader* v. *Ray*, *supra*. "[E]ver since" Congress passed Section 504(d), the lower courts have consistently interpreted and applied it in this manner, "incorporating the ADA's substantive standards for determining whether a covered employer has engaged in illegal discrimination." *Fowler* v. *UPMC Shadyside*, 578 F.3d 203, 208 (3d Cir. 2009).[27]

2. The legislative history of Section 504(d) does not support petitioner's claim that Congress mandated "uniformity and consistency" across all of Title I and Section 504, Pet. 11, 28, 34, or even as to the scope of coverage of the two statutes. Congress simply

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[27] *See also, e.g.*, *Donahue* v. *Consol. Rail Corp.*, 224 F.3d 226, 229 (3d Cir. 2000) ("elements of a claim"); *Gile* v. *United Airlines, Inc.*, 95 F.3d 492, 497 (7th Cir. 1996) ("definition of reasonable accommodation"); *Borkowski* v. *Valley Cent. Sch. Dist.*, 63 F.3d 131, 137 (2d Cir. 1995) (equivalent statutory "obligations").

wanted Section 504(d) to "ensure uniformity and consistency of interpretations," S. Rep. No. 102-357, *supra*, at 7, so that entities covered by both statutes would be governed by the same rules of liability and would know what conduct was prohibited.[28]

Petitioner conveniently omits the explanation by Senator Harkin, the principal sponsor of the 1992 amendment. He explained that under Section 504(d), "those who are covered by title V of the Rehabilitation Act will know that these are the definitions of *reasonable accommodation* and *discrimination* that apply." 138 Cong. Rec. 31,523 (1992) (emphases added). Notably, Senator Harkin did not say there would be any change in "those who are covered." *See also, e.g.*, *Freed* v. *Consolidated Rail Corp.*, 201 F.3d 188, 194 (3d Cir. 2000) (citing "substantive conformity" as the aim of Section 504(d)). In short, Section 504(d) was intended to make the same rulebook apply to "those who are covered" under Section 504 and Title I; it was

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[28] For example, Title I expressly includes reassignment of workers to vacant positions as a possibly required accommodation. 42 U.S.C. § 12111(9)(B). Most courts had held that such reassignment was not required under Section 504. *See Woodman* v. *Runyon*, 132 F.3d 1330, 1339 n.9 (10th Cir. 1997). After the passage of Title I and Section 504(d), courts departed from their pre-1992 decisions and applied the newer ADA standard in cases under both Section 504 and the ADA. *See, e.g., Bratten* v. *SSI Serv., Inc.*, 185 F.3d 625, 633-34 (6th Cir. 1999); *Gile*, 95 F.3d at 497.

not meant to change the roster of Section 504 players.[29]

3. Petitioner's argument also misses the essential point: the most salient distinction between Title I of the ADA and Section 504 is their scope.[30] The two statutes apply essentially the same philosophy and substantive requirements to separate, albeit sometimes overlapping, sets of regulated entities and protected individuals. Congress could not have intended that Section 504(d), enacted with little discussion – and none at all on the scope of coverage – would make the coverage of Section 504 coextensive with that of Title I. This Court would not conclude that Section 504(a) was repealed by implication for certain cases of workplace discrimination unless "the earlier and later statutes [were] irreconcilable" – which is far from the case here. *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974).

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[29] The ADA itself confirms that Title I does not limit the scope of Section 504. Congress directed that "[n]othing in [the ADA] shall be construed to *invalidate* or *limit* the remedies, rights, and procedures of any Federal law . . . that provides greater or equal protection for the rights of individuals with disabilities . . . ." 42 U.S.C. § 12201(b) (emphases added). Construing Section 504(d) to limit who Section 504 protects, because of Title I's purported limitation to "employees," would violate this provision.

[30] *See* Harvey S. Mars, *An Overview of Title I of the Americans With Disabilities Act and Its Impact Upon Federal Labor Law*, 12 Hofstra Lab. L.J. 251, 256-57 (1995).

Petitioner also argues that Title I's limitation to "employees" is "an inextricable element of the standards applied under Title I" and that "there is simply no way to make sense" of Title I's prohibitions "outside [the] context" of "employees" and "employers." Pet. 32-33. But Title I's substantive rules can be applied to "otherwise qualified individuals" as well as "employees." As this case illustrates, an entity covered by Section 504 sometimes refuses to hire, terminates, or otherwise discriminates against an independent contractor just as it would an employee. The standards for judging such conduct can be applied in both situations.

4. If petitioner's argument were accepted, other differences between Section 504 and Title I would be called into question. Petitioner acknowledges several ways in which the statutes differ, Pet. 5-9, and there are others. For example, Section 504 does not limit compensatory damages, but Title I does.[31] Section 504 does not contain Title I's statute of limitations[32] or its requirement of administrative exhaustion.[33] These statutory distinctions belie petitioner's unsupported

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[31] *Compare* 42 U.S.C. § 1981a(b)(3) (2006) *with Roberts* v. *Progressive Independence, Inc.*, 183 F.3d 1215, 1223-24 (10th Cir. 1999) *and Moreno* v. *Consol. Rail Corp.*, 63 F.3d 1404, 1415 (6th Cir. 1995).

[32] *See, e.g., Alberti* v. *City of San Francisco Sheriff's Dep't*, 32 F. Supp. 2d 1164, 1171-72 (N.D. Cal. 1998); *Winfrey* v. *City of Chicago*, 957 F. Supp. 1014, 1018, 1023 (N.D. Ill. 1997).

[33] *See, e.g., Freed*, 201 F.3d at 193-94; *Brennan* v. *King*, 139 F.3d 258, 268 n.12 (1st Cir. 1998).

assertion that "Section 504(d) was meant to eliminate any remaining inconsistencies between the two statutory schemes." Pet. 10. If all of Title I applied to Section 504 under the rubric of "standards," these differences – which Congress presumably chose for a reason – would be extinguished.

5. Finally, petitioner's reading of Section 504 would lead to a most incongruous result. Petitioner could discriminate with impunity against its independent contractor doctors, or those applying for such positions. But, as petitioner acknowledged below, it could not discriminate against other individuals with disabilities, like clients or customers, whose non-employment-discrimination complaints would not trigger Section 504(d).[34] Considering that Section 504(a)'s original, primary purpose was to create equal work opportunities for disabled individuals, this would stand the statute on its head.[35] Petitioner has

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[34] Memorandum in Support of Yuma Anesthesia Medical Services' Motion to Dismiss, *Fleming v. Yuma Reg'l Med. Ctr.*, No. Civ. 05-3906 (D. Ariz. Mar. 6, 2006), at 5.

[35] The logic of petitioner's reading would produce an even stranger result under Section 501, which protects federal government employees from disability discrimination. Section 501(g) contains language virtually identical to that of Section 504(d); it also refers to the "standards" of Title I. *See* 29 U.S.C. § 791(a), (g) (2006). But Title I expressly excludes the United States from its definition of "employer." 42 U.S.C. § 12111(5)(B)(i) (2006). Thus, if Title I dictated Section 501's coverage, Section 501 would have no application whatsoever. Congress could not have intended this absurd result. *See Schrader* Amicus Br., *supra*, at 11-12.

not advanced any reasons why this result would be reasonable, desirable, or what Congress intended.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dr. Lester Fleming, Plaintiff, vs. Yuma Regional Medical Center; Yuma Anesthesia Medical Services, Defendants.	No. CIV 05-3906 PHX-ROS **PLAINTIFF'S FIRST AMENDED COMPLAINT** (Filed Dec. 20, 2006)

Plaintiff, Dr. Lester Fleming, by and through his attorneys, for his First Amended Complaint, alleges as follows:

1. Dr. Lester Fleming brings this action to recover damages caused by the Yuma Regional Medical Center ("YRMC") and Yuma Anesthesia Medical Services ("YAMS") for violations of Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, Title II of the ADA, 42 U.S.C. §§ 12131 *et seq.*, §504 of the Federal Rehabilitation Act of 1973, as amended (29 U.S.C. § 794) ("Section 504"), the Arizona Employment Protection Act ("AEPA") A.R.S. §23-1501 and the Arizona Civil Rights Act ("ACRA") A.R.S. §§ 41-1401 *et seq.*

2. The Plaintiff, Lester Fleming, M.D., is a citizen of the United States who lives at 2857 Esmerelda Drive, Bullhead City, Arizona 86429. Under §504, Defendants perceived Dr. Fleming as an individual with a physical impairment (as a result of his sickle cell anemia) that substantially limited one or more of his major life activities. At all times during his application for employment with Defendants, Dr. Fleming was able to perform all of the essential functions of his position, with or without reasonable accommodation, and, therefore, was a "qualified individual with a disability" as defined by the ADA and §504.

3. Defendant YRMC is an Arizona medical center located at 2400 S. Avenue A, Yuma, Arizona 85364. YRMC is a "federal fund recipient," as defined by §504. YRMC is an employer within the meaning of each of the statutes cited herein.

4. Defendant YAMS is an Arizona medical service located at 2400 S. Avenue A, Yuma, Arizona 85364. The Defendant is a "federal fund recipient," as defined by §504. YAMS, in conjunction with YRMC, is an employer within the meaning of each of the statutes cited herein.

5. The parties to this action reside in and regularly do business within the jurisdiction of this Court. This Court has jurisdiction under 28 U.S.C. §1331. Venue is proper pursuant to 28 U.S.C. §1391(b)(2).

6. On November 1, 2005, Dr. Fleming also filed a timely charge of disability discrimination with the Civil Rights Division of the Attorney General against Defendants YRMC and YAMS. The Attorney General's office issued a right-to-sue letter on August 29, 2006, and this First Amended Complaint is being filed within 90 days of receipt of that letter.

7. Dr. Fleming is an anesthesiologist. In 1991, Dr. Fleming graduated from the State University of New York at Binghamton with a Bachelor of Arts in English. In 2001, Dr. Fleming graduated with a Doctor of Medicine degree from Medical College of Pennsylvania-Hahnemann School of Medicine. In 2002, Dr. Fleming completed his medical internship at Washington University in St. Louis, Missouri. On August 28, 2005, Dr. Fleming successfully completed his medical residency, specializing in anesthesiology, at The Health Science Center at Brooklyn, New York.

8. Dr. Fleming suffers from sickle cell anemia. Sickle cell anemia is a disease involving abnormally shaped red blood cells, which then have difficulty circulating properly through the body. Sickle cell anemia is an inherited disease in which the red blood cells, normally disc-shaped, become crescent-shaped. As a result, they function abnormally and cause small blood clots. Individuals are most often well, but their lives are punctuated by periodic painful attacks. Sickle cell anemia affects African-Americans almost exclusively.

9. Despite having sickle cell anemia, Dr. Fleming has successfully completed competitive academic programs and rigorous professional programs. Throughout Dr. Fleming's medical residency, he had worked similar rigorous schedules as the other residents without any accommodation for his disability. Dr. Fleming never requested, nor sought from either Defendant, any accommodation to his anticipated work schedule.

10. In April 2005, Dr. Fleming applied for an anesthesiologist position with Yuma Regional Medical Center ("YRMC") and was interviewed by Yuma Anesthesia Medical Services ("YAMS").

11. In May 2005, YRMC and YAMS offered Dr. Fleming a position as an anesthesiologist. Soon after, YAMS and YRMC and Dr. Fleming executed an employment contract. Under that agreement, Dr. Fleming's stated annual salary with YRMC and YAMS was to be $360,000. In July 2005, YRMC

facilitated Dr. Fleming's search for housing in Arizona by paying for his travel to Yuma and hiring a moving company to move his furniture. Dr. Fleming was scheduled to move to Yuma on September 12, 2005, and to start working for YRMC and YAMS on October 3, 2005.

12. On August 28, 2005, Dr. Raj Khona, a YAMS partner, called and left a voice mail message informing Dr. Fleming that his scheduled move to Arizona was cancelled because of a "problem with his credentialing." Credentialing is a time-intensive process where hospitals gather all of the academic and professional information about the physicians they have hired. A hospital must credential a physician before he or she is allowed to work in its facilities.

13. On August 29, 2005, Dr. Fleming called Dr. Khona for clarification and to learn if there were any other issues besides his credentialing. Dr. Khona replied that he was not in a position to elaborate.

14. On August 30, 2005, Dr. R. Watson, YAMS's Acting Chairman, called on behalf of the other YAMS partners to clarify the credentialing process. Dr. Watson told Dr. Fleming that "red flags were raised after we received your Residency Director's letter . . . the hospital is in the process of contacting your hematologist/oncologist." During this conversation, Dr. Watson recommended that Dr. Fleming seek alternative employment because his credentialing could not be guaranteed.

15. On September 1, 2005, Dr. Fleming met with Dr. David Diuguid, his hematologist/oncologist, regarding his employment with YRMC and YAMS. Dr. Diuguid told Dr. Fleming that YRMC had sent him a letter asking that he confirm a statement made by The Health Science Center at Brooklyn's Residency Director, Dr. Audree Bendo. On information and belief, Dr. Bendo had sent a letter to YAMS explaining that Dr. Fleming had sickle cell anemia.

16. On September 29, 2005, Dr. Fleming participated in a conference call with YRMC and YAMS's Drs. Patel, Khona, and Rojas. During this conversation, they interrogated Dr. Fleming about his health and questioned his ability to work in their medical practice. They explained that physicians in their practice sometimes worked schedules of up to 36 hours straight. Dr. Fleming responded that, during his residency, he worked similar hours without ever requesting an accommodation. Dr. Patel responded that she did not care about Dr. Fleming's previous schedule; she only cared about what would happen if he worked for YAMS and YRMC. At one point during the conversation on September 29th, Dr. Khona stated that if Dr. Fleming was scheduled to work and got sick he should not expect any help. Dr. Khona also said, "I don't know of any insurance company that would insure you once they know that you have sickle cell anemia. Did you think about that? . . . Why didn't you tell us that you had sickle cell anemia?"

17. During the conference call on September 29th, Drs. Patel, Khona, and Rojas told Dr. Fleming

that he would need to sign an addendum to his employment contract if he still wanted to work for them. Dr. Khona would not give specific details about the addendum other than telling him that Dr. Fleming would be responsible for his own cases and calls. They asked if he would agree to sign it; Dr. Fleming said that he would need to see it first. Drs. Patel, Khona, and Rojas agreed to forward the addendum to Dr. Fleming.

18. Defendants YAMS and YRMC have assumed that Dr. Fleming will not be able to obtain insurance because of his sickle cell anemia. Defendants have also assumed that Dr. Fleming would not be able to work a normal work schedule because he has sickle cell anemia.

19. YAMS and YRMC sent the addendum to Dr. Fleming on November 4, 2005, five weeks after he was originally scheduled to start working. Between October 3 and November 4, 2005, Dr. Fleming had called repeatedly in an attempt to obtain a copy of the addendum. The Defendants told Dr. Fleming that their lawyers were "working on it."

20. Amongst other adverse changes to the original employment contract, the addendum provided that he could only work for YRMC and YAMS if he agreed that it would not be possible to provide him a reasonable accommodation for his operating room and call schedules.

21. It is long past the date that Dr. Fleming was scheduled to start working for YAMS and YRMC.

However, they refused to allow him to work unless and until he agreed to sign the addendum to his employment agreement.

22. Defendants YRMC and YAMS perceived Dr. Fleming as being substantially limited in one or more major life activities including, but not limited to, working, as defined by §504.

23. The Defendants' actions set forth in this Complaint, including the actions of its management employees, were intentional and willful.

24. At all relevant times, Dr. Fleming was qualified to perform the essential functions required of an anesthesiologist, with or without a reasonable accommodation.

25. As a result of the Defendants' actions, Dr. Fleming has suffered damages, including, but not limited to, the loss of wages and benefits, loss of professional opportunities, and emotional distress and mental pain and anguish.

FIRST CLAIM FOR RELIEF

YRMC Refused to Credential and/or Terminated Dr. Fleming Based on a Perceived Disability in Violation of the Rehabilitation Act

26. Paragraphs 1-25 are incorporated by reference the same as if fully pleaded herein.

27. YRMC is a covered entity that receives federal funding, and is prohibited from discriminating against "qualified individuals" with disabilities.

28. Defendant YRMC learned that Dr. Fleming had sickle cell disease and subsequently refused to allow him to start working on October 3, 2005. Then, on November 4, 2005, Defendant would only allow Dr. Fleming to work if he agreed that YRMC would not have to provide him with a reasonable accommodation in his schedule.

29. Defendant YRMC refused to credential or employ Dr. Fleming.

30. Dr. Fleming has suffered damages as a result of YRMC's unlawful acts, including past and future lost wages and benefits, severe emotional trauma, and the costs of bringing this action, including attorneys' fees.

SECOND CLAIM FOR RELIEF

YAMS Refused to Hire and/or Terminated Dr. Fleming Based on a Perceived Disability in Violation of the Rehabilitation Act

31. Paragraphs 1-30 are incorporated by reference the same as if fully pleaded herein.

32. YAMS is a covered entity that receives federal funding, and is prohibited from discriminating against "qualified individuals" with disabilities.

33. Defendant YAMS learned that Dr. Fleming had sickle cell disease and subsequently refused to allow him to start working on October 3, 2005. Then, on November 4, 2005, Defendant would only allow Dr. Fleming to work if he agreed that it would not have to provide him with a reasonable accommodation.

34. Defendant YAMS refused to hire Dr. Fleming.

35. Dr. Fleming has suffered damages as a result of YAMS's unlawful acts, including past and future lost wages and benefits, severe emotional trauma, and the costs of bringing this action, including attorneys' fees.

THIRD CLAIM FOR RELIEF

YAMS Refused to Hire and/or Terminated Dr. Fleming Because of his Perceived Disability in Violation of Title I of the ADA

36. Paragraphs 1-35 are incorporated by reference the same as if fully pleaded herein.

37. YAMS violated Title I of the ADA, 42 U.S.C § 12101 *et seq.* by refusing to hire and/or terminating Dr. Fleming because of his perceived disability.

38. Dr. Fleming has suffered damages as a result of YRMC's unlawful acts, including past and future lost wages and benefits, severe emotional

trauma, and the costs of bringing this action, including attorneys' fees.

FOURTH CLAIM FOR RELIEF

Defendants Refused to Hire and/or Terminated Dr. Fleming Because of his Perceived Disability in Violation of Title [sic] **of the ADA.**

39. Paragraphs 1-38 are incorporated by reference the same as if fully pleaded herein.

40. Defendants violated Title I of the ADA, 42 U.S.C § 12101 *et seq.* by refusing to hire and/or credential Dr. Fleming because of his disability.

41. Dr. Fleming has suffered damages as a result of Defendants' unlawful acts, including past and future lost wages and benefits, severe emotional trauma, and the costs of bringing this action, including attorneys' fees.

FIFTH CLAIM FOR RELIEF

Defendants Refused to Credential and/or Terminated Dr. Fleming Because of his Perceived Disability in Violation of Title II of the ADA

42. Paragraphs 1-41 are incorporated by reference the same as if fully pleaded herein.

43. Defendants violated Title II of the ADA, 42 U.S.C § 12131 *et seq.* by refusing to credential and/or discharging Dr. Fleming because of his disability.

44. Dr. Fleming has suffered damages as a result of Defendants' unlawful acts, including past and future lost wages and benefits, severe emotional trauma, and the costs of bringing this action, including attorneys' fees.

SIXTH CLAIM FOR RELIEF

Defendants Breached the Employment Contract in Violation of the Arizona Employment Protection Act.

45. Paragraphs 1-44 are incorporated by reference the same as if fully pleaded herein.

46. The AEPA prohibits an employer from wrongfully refusing to hire and/or discharging an employee where the employer and employee signed a written contract for a specified duration of time and the employee was terminated prior to the expiration of such period. A.R.S. § 23-1501(1).

47. Defendants' refusal to allow Dr. Fleming to start working on October 3, 2005, was a breach of the employment contract in violation of the AEPA.

48. Dr. Fleming has suffered damages as a result of Defendants' unlawful acts, including past and future lost wages and benefits, severe emotional trauma, and the costs of bringing this action, including attorneys' fees.

SEVENTH CLAIM FOR RELIEF

Defendants' Refusal to Hire and/or Terminated Dr. Fleming Because of his Disability in Violation of the ACRA

49. Paragraphs 1-48 are incorporated by reference the same as if fully pleaded herein.

50. Defendants violated the ACRA, A.R.S. § 41-1401 *et seq.* by refusing to hire and/or discharging Dr. Fleming because of his disability.

51. Dr. Fleming filed a Charge of Discrimination with the Arizona Attorney General's Civil Rights Division in timely fashion. On September 8, 2006 that Division mailed a Notice of Right to Sue (dated August 29, 2006) to Dr. Fleming. This action is brought within 90 days of receipt of that Notice.

52. Dr. Fleming has suffered damages as a result of Defendants' unlawful acts, including past and future lost wages and benefits, severe emotional trauma, and the costs of bringing this action, including attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Accept jurisdiction over this action;

B. Order the Defendants jointly and severally to compensate the Plaintiff for his past and future loss of wages and benefits, plus interest;

C. Enter judgment in favor of the Plaintiff for such amount as may be awarded by a jury for compensatory damages for his physical and emotional suffering and loss of enjoyment of life;

D. Enter judgment in favor of the Plaintiff for such mount [sic] as may be awarded for punitive damages;

E. Reinstate the Plaintiff to his former position or, in lieu of reinstatement, award him front pay (including benefits);

F. Award to the Plaintiff all costs and reasonable attorneys' fees incurred in connection with this action;

G. Grant such additional or alternative relief as may appear to the court to be just and equitable.

RESPECTFULLY SUBMITTED this 20th day of December, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2006, I electronically transmitted the attached Plaintiff's First Amended Complaint to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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I hereby certify that on the 20th day of December, 2006, I served the attached First Amended Complaint by mail on the following, who are not registered participants in the CM/ECF System, or requested a paper copy:

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s/ Lyn Caglio